

Mortgagee repossession of Aircraft in the UAE

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In particular, we are frequently asked to advise upon the validity of English-law mortgages within the UAE, particularly following the decision by the English Courts in *Blue Sky One Limited & Ors v Mohan Air & Anor* ('Blue Sky') in 2010.

English-Law Mortgages in the UAE

Following the decision in *Blue Sky*, there has been an influx of queries particularly in relation to the validity of English-law mortgages that may have been created whilst an aircraft is located within the UAE or its airspace (the *lex situs* of the aircraft).

In *Blue Sky*, the court held that an English-law mortgage would only be considered as validly created if it was created whilst the aircraft was within English territory, English airspace or within a jurisdiction where the domestic laws recognize as valid the English-law mortgage, without reference to its conflict of laws rules when deciding validity. If the aircraft is located in international airspace, then the English courts will look to the validity of the English mortgage in the state of registration of the aircraft.

Subject to certain qualifications, the choice of English laws in a Mortgage document will be upheld as a valid choice of law by the courts in the UAE. A UAE court may however apply UAE law when interpreting the Mortgage rather than the chosen English law in cases where, in the opinion of the Court, there is insufficient connection between the Mortgage and English law and jurisdiction; or, the application of English law is deemed to be contrary to public policy. The UAE Courts tend to interpret this provision broadly and in practice, are reluctant to recognize a choice of foreign law, despite UAE law permitting its recognition.

Enforcement and Repossession

English-law mortgages often contain self-help provisions allowing for the repossession of the aircraft without recourse to court proceedings. However under UAE law, other than the right of set off under a security agreement, there are generally no self help remedies available, and the enforcement of secured assets is a court driven process.

When an aircraft is registered in the UAE with the General Civil Aviation Authority ('GCAA') register, a lender will be noted as a 'mortgagee' on the Certificate of Registration ('COR') and a copy of the mortgage document held on the register. The GCAA register will note the mortgagee on the COR and retain a copy of the mortgage. Even if it is an English-law mortgage it will be considered with the same regard as a local-law mortgage.

Another requirement of the GCAA when registering an aircraft is the execution of an Irrevocable Deregistration Export Request Authorisation ('IDERA') along the lines provided for under the Cape Town Convention to which the UAE is a signatory. This IDERA is generally executed in favour of any mortgagee (who is referred to as the 'Authorised Party'), technically allowing them to de-register the aircraft and export the aircraft from the country.

The Cape Town Convention provides various self help remedies for creditors, including mortgagees. However, when ratifying the Cape Town convention the UAE made certain declarations, one of which is that, where remedies available to the creditor under the Convention do not specify that an application to the Court is required, it may only be exercised by application to the Court.

When considering other options for grounding an aircraft, UAE law has limited alternatives. The GCAA has issued a directive through an Information Bulletin, which sets out minimum insurance requirements for civil aircraft before they are permitted to enter into, fly over or leave the UAE. In cases where it appears that these are not met by an operator of an aircraft, technically the aircraft should be grounded by the authorities. In practice however, it can be very difficult to ground an aircraft on this basis due to the time it takes the authorities to verify insurances held; possible foreign governmental relations considerations; and the possibility that an operator may obtain (either legitimately or fraudulently) alternative cover at short notice which would appear on the face of it to satisfy the requisite requirements.

Need for a Court Order

Given the above, if a mortgagee (or owner) wishes to repossess an aircraft in the UAE, it will need to obtain a Court order.

Under the Civil Procedures Law, it would be permissible for a mortgagee over an asset with a valid claim against a defendant who has possession of the aircraft, to attach that asset. Therefore in the event of a dispute over the right to possession of an aircraft or where the mortgagee by reason of claims against mortgagor disputes the entitlement of the mortgagor to retain the aircraft and thereby seeks to remove or export the Aircraft from the UAE, then the mortgagee may pursue attachment of the aircraft by court proceedings in the local UAE Court where the aircraft is located.

These proceedings are generally referred to as 'retrieval' proceedings and from the mortgagee's perspective are usually based on proving ownership of the aircraft (as mortgagee, such as a right to repossess following default under the mortgage or the facility secured by such mortgage, whereby they are the ultimate owner of the aircraft and entitled to possession over that of another party who is in actual possession of the aircraft). An attachment of the asset claimed may support retrieval proceedings provided a prima facie claim or default under the credit facility can be proved by way of documentary evidence.

An attachment application is filed by UAE based lawyers on behalf of the party applying to the UAE court. This is an application made without notice to the other party, and to a duty judge who makes a prompt decision on the merits of the proposed attachment. This attachment is based solely on the documents provided as evidence and a brief verbal explanation by the applicant's lawyer. There is no scope for affidavits, witnesses or significant (lengthy) verbal argument. If the attachment application is successful, an attachment order is granted by the judge and sent by the court bailiff for attachment of the aircraft. Within eight days of any successful attachment application, a substantive action needs to be filed in support of the attachment proceedings. Failing this, the attachment order will be considered void.

As much information as possible should be supplied to the Court at the attachment stage, evidencing the mortgagee's rights to repossess, including a copy of the mortgage, notices of default, ferry flight notices or other documentation supporting the mortgagee's claims over the aircraft and evidencing the right to repossess. This information will be relied upon, along with any further relevant documentation, for the substantive proceeding.

If there is a reasonable argument by the mortgagor as to why the mortgagee has no right to recover the aircraft under the mortgage, then proceedings may become quite drawn out. It is possible that proceedings in the court of first instance, court of appeal and court of cassation, may last 12 months or more. This does not necessarily mean that the aircraft would be grounded for the entire period. Based upon the IDERA, the mortgagee if named as the Authorised Party, has the right to de-register and export the aircraft. The court, when presented with this, may chose to release the aircraft to the possession of the mortgagee and allow its deregistration and export; meanwhile, they may also request the mortgagee to

pay into court a guarantee to satisfy any claim for damages that may be made by a mortgagor, in the event that the mortgagee's claim was unfounded.

Conclusion

Although an English-law mortgage would be upheld as a valid mortgage in the UAE, it must be borne in mind that the mortgage may be read through the eyes of the local UAE laws. This should not result in an interpretation vastly different to that in any other jurisdiction and generally speaking, a mortgage would be interpreted on its contractual provisions (save for instances otherwise provided for in this article), in accordance with its normal meaning.

A default on a mortgage can form the basis for an attachment order and the ultimate repossession of the aircraft by the mortgagee. Unfortunately any self help remedies contained in the mortgage allowing for the repossession of the aircraft will not, in themselves, allow for the mortgagee to repossess the aircraft whilst it is located in the UAE. They would however form the basis for an attachment application and retrieval proceedings before the UAE courts whereby the mortgagee can repossess the aircraft.